

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

BLAKE BROWN, and
DEAN BIGGS, and
JACQUELINE DEHERRERA, and
RUTH ANN HEAD, and
MARLENE MASON, and
ROXANNE MCFALL, and
RICHARD MEDLOCK, and
BERNADETTE SMITH,

Plaintiffs,

v.

SETH D. HARRIS, Acting Secretary of Labor, UNITED STATES DEPARTMENT OF
LABOR, an agency of the United States governing OFFICE OF WORKERS COMPENSATION
PROGRAMS, an agency of the United States Department of Labor.

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION AND NATURE OF THE CASE

1. Plaintiffs bring this action for injunctive and declaratory relief arising under the Freedom of Information Act, 5 U.S.C. § 552(a) *et seq.*, (hereinafter FOIA) and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* against the Defendant, Seth D. Harris, U.S. Department of Labor, governing the Office of Workers’ Compensation (“OWCP”), for their unlawful decision in response to Plaintiff’s FOIA requests to withhold information under Exemptions 4 and 6 of FOIA, 5 U.S.C. § 552(b)(4) and (6).

2. Plaintiffs sustained on the job injuries during the course and scope of their federal employment. Plaintiffs claimed federal workers compensation benefits under the Federal

Employment Claims Act (FECA) which is administered by OWCP. Plaintiffs' claims were accepted by OWCP.

3. Thereafter, a conflict of medical opinion developed. FECA provides that conflicts of medical opinions are to be resolved by the selection of an independent medical examiner who acts as a referee. The referee physician's opinion is determinative of the conflict unless it is irrational or speculative.

4. FECA provides that the referee physician is to be selected from a list of all board certified physicians on a rotating basis starting with physicians closest to the claimant's home.

5. On information and belief, OWCP is not randomly selecting referee physicians. This goes to the heart of the administrative process as the use of only a few physicians provides these physicians with a financial motive to provide opinions that are adverse to claimants in order to stay on the OWCP preferred providers list.

6. Therefore, Plaintiffs made FOIA requests to OWCP to determine how referee physicians were selected to determine whether the Defendant is equitably and randomly choosing referee physicians.

7. OWCP granted in part and denied in part Plaintiffs' requests for information about the selection of referee physicians by the PDS computer program used by OWCP to select referee physicians.

8. OWCP provided documents in which the identities of physicians and claim numbers were redacted rendering the information meaningless.

9. OWCP, unnecessarily, unreasonably, and unlawfully withheld and redacted information responsive to Plaintiffs' FOIA requests, improperly asserting that such information is exempt from disclosure pursuant to FOIA Exemptions 4 and 6 (5 U.S.C. § 522(b)(4) and (6)).

10. During the period from 2/19/2010 to 6/13/2012, Plaintiffs individually submitted FOIA request(s) to the OWCP seeking documentary information over the past ten (10) years:

a. the names, zip codes and referral histories of all referee specialist physicians listed in the PDS computer system for District 12;

b. documents showing partial case numbers and zip codes of claimants who were assigned to particular referee physicians;

c. the names of physicians who were selected for referee decisions in the field of orthopedic medicine;

d. the dates and reasons named physicians in the PDS system were bypassed for selection;

e. the functionality of the PDS system by screen shots of the drop down boxes in the computer system.

11. OWCP repeatedly:

a. provided documents showing a list of physicians in the specialty of orthopedic medicine with redacted names, zip codes, and claim numbers (which inconsistently stated the number of examinations performed by the unidentified referee physicians);

b. provided documents showing the numbers of referee appointments made to a particular physician, with redacted names and zip codes of the physicians and redacted claim numbers (the number of appointments for the same referee physician varied in documents from 8 to 30 for the same physician and were gross under-representations of the number of referrals shown in other logs).

c. failed to provide any documents showing the specialty physicians who are in the referral system or the physicians available in each zip code;

d. failed to provide documents showing which physicians were bypassed and the reasons for bypasses;

e. failed to provide screen shots of the PDS system information for the requesting Plaintiff, including drop down boxes in the PDS system.

12. The OWCP responses invoked FOIA Exemptions 4 and 6 to withhold non-exempt information, including the names of PDS referral physicians and information showing how the PDS selection system operates.

13. The names of referee physicians in the PDS system are crucial to because matching the names of physicians who conducted examinations with the number of examinations each physician provided would reveal immediately whether the Defendant is equitably and randomly selecting referee physicians.

14. All board-certified physicians in Colorado are to be placed in the PDS system; their identities are not private and they are not competing with each other for assignments.

15. Accordingly, the Defendant's withholding of this information under the assertion of exemption 4 and 6 it is unlawful.

16. Plaintiffs seek declaratory relief establishing that Defendant violated FOIA and the APA under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a).

17. Plaintiffs also seek injunctive relief directing Defendant to promptly provide Plaintiffs with the requested information as well as an order enjoining Defendant from relying on unlawful practice on all future FOIA undertakings.

18. If they substantially prevail, Plaintiffs will seek an award of attorneys fees, costs and other expenses pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) and the Equal Access to Justice Act, 28 U.S.C. § 2412.

Parties

19. Paragraphs 1 through 18 are incorporated herein by reference.

20. Plaintiff(s), Dean Biggs, Blake Brown, Jacqueline DeHerrera, Roxanna McFall, Ruth

Ann Head, Richard Medlock, Marlene Mason and Bernadette Smith are citizens of the United States and the State of Colorado and reside in the State of Colorado.

21. Plaintiffs suffered on the job injuries arising out of their employment with the United States Government.

22. Plaintiffs claim benefits under FECA as administered by OWCP.

23. During each of the Plaintiffs' claims, conflicts of medical opinion arose between there treating physicians and second opinion physicians selected by OWCP.

24. In each of the Plaintiffs' claims, OWCP selected a physician to conduct a referee medical examination using the PDS system.

25. The referee physician examinations were conducted by orthopedic specialists who on information and belief conducted a disproportionate share of OWCP referee examinations.

26. The referee examinations would determine the outcome of their claims for medical and wage loss benefits.

27. Plaintiffs filed FOIA requests to verify that the referee physician was selected randomly from a database of all board certified physicians as required by FECA and OWCP.

28. The relief sought by Plaintiffs would provide valuable and necessary information that will allow the public to ensure that the selection of referee physicians is transparent and that public funds are properly administered to avoid fraud, waste and abuse.

29. Defendant, Seth D. Harris, Acting Secretary of the Department of Labor, is the acting head of the United States Department of Labor, an agency of the executive branch of the United States and is responsible for the management of OWCP and is responsible for hearing all administrative FOIA appeals, including the underlying administrative appeals here.

30. Defendant, United States Department of Labor ("DOL") is an agency within the meaning of 5 U.S.C. § 552A(a)(1), and is in possession and/or control of records pertaining to Plaintiff(s).

31. Defendant, OWCP is a subset of the DOL and is responsible for managing and implementing workers compensation programs including the PDS program to select neutral physicians to evaluate the final medical ratings of injury claims.

32. OWCP in its managerial capacity is responsible for implementing and complying with federal law including federal laws implicated by this action.

33. OWCP's responses to Plaintiffs' FOIA requests unlawfully redacted information responsive thereto.

Jurisdiction and Venue

34. Paragraphs 1 through 33 are incorporated herein by reference.

35. Jurisdiction is proper in this Court because this civil action alleges violations of the Freedom of Information Act, 5 U.S.C. 552 *et seq.* including 5 U.S.C. §§ 552a(3)(A-D) and 552(a)(4)(B) and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* The Court has jurisdiction of these claims pursuant to 28 U.S.C. § 1331 because this civil action arises under the laws of the United States.

36. This action reflects an actual, present and justiciable controversy between the Plaintiffs and the Defendant; Plaintiffs' interests will be adversely affected and irreparably injured if Defendant continues to violate the FOIA and the APA as alleged herein.

37. The requested relief is authorized by 5 U.S.C. §§ 552; 5 U.S.C. § 701 *et seq.* including 5 U.S.C. 706 *and* 28 U.S.C. §§ 2201 and 2202.

38. The requested relief would redress the actual, concrete injuries to Plaintiffs caused by the Defendant's failure to comply with duties mandated by FOIA and the APA and the regulations promulgated pursuant to these federal statutes.

39. Venue is appropriate in this Court pursuant to 5 U.S.C. §552(a)(4)(B), which provides venue for FOIA cases in Colorado because the FOIA requests were made on behalf of Plaintiffs

who all reside in Colorado. 28 U.S.C. § 1391.

Exhaustion of administrative remedies.

40. All conditions precedent to the filing of this action are satisfied in that:

a. On 2/19/2010 Plaintiff Dean Biggs made a FOIA request for information regarding the referee selection process in general and in his case; on 12/1/2010 Ruth Ann Head made a similar FOIA request, on 12/30/2010, Blake Brown made a similar FOIA request; on 5/16/2011 DeHerrera made a similar request; on 4/26/2011 Roxanne McFall made a similar request; on 12/30/2010 Richard Medlock made a similar request; on 2/28/2011 Marlene Mason made a similar request; on 9/25/2009 Bernadette Smith made a similar request. ¹

b. In each case, Defendant denied in part some of Plaintiffs' requests, did not respond to some of Plaintiffs' requests, and redacted information including the names of physicians performing referee examinations, citing exemptions 4 and 6 of FOIA.

c. In each case OWCP failed to respond at all to requests for information regarding the PDS functionality and the referee assignments made by PDS by specific zip codes.

d. All Plaintiffs filed timely Administrative Appeals within 90 days of Defendant's responses to their FOIA requests. Dean Biggs appealed on 11/29/2012; Blake Brown on 10/26/2011; Jacqueline DeHerrera appealed on 11/18/2011; Roxanne McFall appealed on 11/18/2011; Ruth Ann Head on 10/12/2010; Roxanne McFall on 11/18/2011, Richard Medlock on 11/18/2011, Marlene Mason on 10/26/2011; and Bernadette Smith on 12/24/2009.

e. Defendant did not respond to any of the Plaintiffs administrative appeals.

f. If an administrative appeal is denied, or if the agency does not respond to the appeal within 20 days, the challenged agency action is final and subject to judicial review pursuant to 5 U.S.C. §§ 552 (a)(4)(B); 5 U.S.C. (a)(6)(A)(ii) and (a)(6)(C)(i).

¹ Most Plaintiffs made multiple FOIA requests supplemental requests and timely appeals during this time period.

g. The court will review the agency's decision de novo.

Statutory Background

41. FOIA, 5 U.S.C. § 552 *et seq.* requires that a federal agency disclose documents and information to any person except where the document falls under a specific exception. *See* 5 U.S.C. § 552(b).

42. The U.S. Supreme Court has stated that : “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act, “and “consistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.”

43. Defendant invoked Exemption 4 to withhold information it stated would impede its ability to obtain information about physician specialists in the future.

44. The specific language of Exemption 4 states that FOIA “does not apply to matters that are:...trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(4).

45. Defendant also invoked Exemption 6 to withhold information about individuals in “ personnel and medical files and similar files.”

46. The specific language of Exemption 6 states that FOIA “does not apply to matters that are:...personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

47. The agency must undertake a search that is reasonably calculated to uncover all relevant non-exempted documents.

Statement of Facts

Paragraphs 1 through 47 are incorporated herein by reference.

A. Referee Physician Selection process.

48. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, named a referee physician, who shall make an examination. 5 U.S.C. § 8123(a).

49. Plaintiffs were assigned referee physicians under 5 U.S.C. § 8123(a) of FECA.

50. OWCP will select a referee physician who is qualified in the appropriate specialty and who has no prior connection with the case.

51. Under FECA the opinion of a referee physician is entitled to special weight.

52. A referee physician specialist selected by OWCP to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment.

53. A claimant should be able to rely upon the impartiality of the referee physician specialist.

54. To achieve this, OWCP has developed safeguards against any possible appearance that the selected referee's physician's opinion is biased or prejudiced.

55. FECA regulations, cited in the FECA Procedure Manual, mandate that the referee physician be randomly selected from a database containing all Board Certified physicians in the required specialty. The service of all available and qualified board-certified specialists is required to the extent possible to eliminate any inference of bias or impartiality.

56. FECA uses a medical directory called the Physician Directory Service ("PDS") to select referee physicians.² The PDS includes physicians listed in the American Board of Medical Specialists and specialists certified by the American Osteopathic Association. All qualified board-certified specialists are supposed to be placed automatically in the PDS system.

² Since the initiation of claimants FOIA requests OWCP changed the computer program from the PDS to the MMA which provides the same functions.

57. The PDS is a stand-alone software program designed to ensure consistent rotation among referee physicians.

58. The PDS database software is designed to search for a referee physician first in the claimant's zip code and then in 10, 20, 30, 40, 50 and 75 miles radii of a claimant's zip code.

59. The PDS is supposed to select a referee physician in alphabetical order as listed in the roster chosen under specialty and/or subspecialty heading in the appropriate geographical area and repeating the process when the list is exhausted.

60. The rotating selection of referee physicians by PDS is supposed to negate any appearance that preferential treatment exists between a particular physician and OWCP.

61. Any reason for "bypassing" a physician for the examination should be documented in each case file.

62. Selection of physicians outside of the claimants' zip code should not be used unless no physicians in employees' zip codes practice the necessary specialty.

63. Only if the selection procedures, which were designed to achieve this result, are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.

64. This goal remains as vital as ever to the integrity of the federal employees' compensation program.

C. Plaintiffs' Requests for Information

65. Plaintiffs each requested information for ten years, including the periods from 2000 to 2011.

66. Plaintiffs based all their requests on information in the 6/4/2002 FECA bulletin 01-11, which describes the PDS and the functions and logs available in the PDS referee software system.

67. Plaintiffs asked for documents, including screen shots from the PDS referee software, including but not limited to the following:

a. The names, addresses and zip codes of all referee physicians used and the claimants' claim numbers and exam types for all appointments for ten years up to the date of the FOIA requests. The physician names and claimants' case numbers were redacted on documents that would show this information.

b. The referral history for referee physicians selected in each plaintiff's case, including Jeffrey Sabin, M.D., Orthopedic Specialist, for the past 10 years.

c. The claimants' information was redacted, the physicians' names were redacted and the reports given for each Plaintiff are inconsistent in the total number of examinations reported for a physician.

d. The identities of physicians by name and specialty and zip code listed in the PDS were requested.

e. There were no responses to those requests.

f. A "Bypass History" report for all appointments scheduled and showing the physicians bypassed and the reasons for bypasses in the past ten (10) years.

g. There were no responses to those requests except a description of several bypasses.

h. A printout of any reports of physicians that District 12 suspended from the PDS including but not limited to codes: N (unwilling to take DOL cases); M (moved); R (deceased or retired); P (phone missing, wrong); E (excluded by regulation or lost license); D (duplicate; Q (quality); C (complaint); F (FCC) and/or O (other.).

i. OWCP responded the PDS is unable to produce a report as requested.

j. Screenshots showing the drop-down boxes in the PDS program using each Plaintiff's claim number.

k. OWCP stated it was unable to produce screen shots as requested.

D. Responses to Plaintiff's Requests.

68. In responses, OWCP provided documents referencing physicians used by OWCP in the Colorado in District 12, for referee physicians for the most part in the years from 2005 to 2010.

69. OWCP redacted the names and zip codes of the physician specialists in PDS logs other the referee physician selected for each claimant.

70. OWCP left physician specialty numbers in the documents; and, it appears orthopedic specialist use is 21/NA.

71. OWCP redacted the names and the entire claim numbers for each claimant who was sent to a referee physician other than the claimants making the request.

72. OWCP reported there were 609 referee decisions in all specialties for District 12 in Colorado from December 4, 1999 to December 4, 2009.

73. Dr. Sabin, a Colorado orthopedic surgeon in specialty 21/NA, was reported as a selected referee physician in at least 112 cases from 2005 to 2010 and in 61 cases from 2000 to 2005.

74. Dr. Sabin also received 69 referee examination assignments from a Kansas District within three (3) years from 2005 to 2008.

75. Documents provided show only 18 unidentified orthopedic specialists performed all of the referee examinations in District 12 in Colorado during the ten (10) year period.

76. Because the names of the 18 orthopedic specialists performing examinations are redacted, it is impossible to know whether some physicians in the log are duplicated.

77. Of the 18 orthopedic specialists who purportedly received assignments for referee examinations, several received the majority of the assignments.

78. The reported use of referee physicians in the orthopedic specialty is widely disparate: one orthopedic specialist used performed only 3 examinations in ten (10) years while Dr. Sabin

performed 173 examinations in ten (10) years.

79. OWCP sent Plaintiffs in this case 131 miles, 184 miles, and 159 miles from their zip codes to be examined referee orthopedic specialists who have a disproportionately high number of referrals.

80. Some of the plaintiffs were sent to Dr. Sabin after 30 bypasses of other orthopedic specialists in the rotation system for unexplained reasons.

81. Anecdotally, OWCP states that there are no orthopedic physicians who accept referee appointments within a reasonable radius of some Plaintiffs in the Denver metropolitan area.

82. By eliminating physician zip codes and names and by not providing the names of physicians active in the PDS, there is no way to check the accuracy of that statement.

83. Without physicians' names and the claimants' zip codes, it is impossible to know whether available specialists within claimants' zip codes are being bypassed in favor of a few physicians which generates the appearance of impropriety.

84. Plaintiffs in their appeals agreed to substitute 4 digits of claimants' claim numbers for claimants' names.

85. Substitutions of the claimants' identities for 4 digits of their claim numbers will ensure confidentiality of the claimants' identities and medical information.

86. Plaintiffs need the physicians' names and zip codes, the claimants' zip codes and the last 4 digits of the claim number for the information about the selections to be intelligible.

87. Plaintiffs seek this information to verify that the OWCP database contains all board certified physicians and that referee physicians are chosen fairly, randomly and in rotation.

OWCP's Stated Reasons for Withholding Information exemptions 4 and 6.

88. OWCP concluded with respect to disclosures of physician's names in the PDS system and used by OWCP that "the withheld information falls under the category of information

protected by Exemption 4, i.e. “commercial or financial information from a person that is privileged or confidential.”

89. OWCP determined that the physician identification would have the following effect under Exemption 4: (1) impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained.”

90. The information requested will not (1) impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained.”

91. None of the qualified board-certified physicians are in competition with one another because all of them are included in the PDS rotation.

92. Physician specialists who perform referee examinations are not entitled to privacy regarding their availability and/or use as referral physicians in the PDS.

93. Physician specialists who perform referee examinations are already known to the claimants assigned to them.

94. Defendant’s administrative decision unlawfully invoked FOIA Exemption 4 to withhold information responsive to Plaintiffs’ requests.

95. Defendant also invoked Exemption 6 to withhold information about individuals in “ personnel and medical files and similar files ” when a disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”

96. There is no privacy exemption for the name and addresses of referee physicians.

97. The mere name of a referee physician is not a personnel or medical file.

98. The name and address of a physician who performs referee examinations is not confidential.

99. A partial claim number and zip code of a claimant is not confidential and cannot lead to violations of confidentiality of personnel or medical or similar files.

100. Plaintiffs requested copies of the PDS pull down screens, which will show the various functions that the system can perform.

101. This information is needed since the functionality of the system is shrouded in secrecy.

102. There are no notebooks or manuals that provide the functions of the system.

103. The functions of the PDS are in effect a black hole.

104. OWCP responded that PDS is unable to produce a report as requested.

105. OWCP responded stating that screens may only be generated with the specific case number results and those results are exempt under FOIA Exemption 6.

106. Plaintiff on appeal responded that the records including PDS menu screens and pull-downs can be generated under his own claim number.

107. No confidentiality will be broken if the screen shots are of a Plaintiff's own case.

108. Printouts of screen shots do not require special research and are self-explanatory.

109. This non-response deprives claimants and the public of access to basic information on the identity of reports or searches that are needed to participate fully in the development of their claims and to understand the selection process.

B. Selection of referee physicians gives rise to an appearance of impropriety.

110. A search of Board Certified physicians in the orthopedic category ("21/NA") shows that many orthopedic physicians were bypassed without explanation.

111. The information requested, if physician names were not redacted, will show that the District 12 Office uses only a few physicians from those available as referees in violation of the regulations.

112. The few physicians are chosen over and over again to act as referees; OWCP does not randomly select referees from a database of all Board Certified physicians as mandated by FECA.

113. Plaintiffs were assigned to orthopedic specialists in zip codes outside of their office locations on the grid.

114. The referees selected for the Plaintiffs are for the most part not supportive of claimants.

115. Dr. Sabin and other disproportionately used orthopedic specialists have demonstrated a predictable pattern of bias toward claimants; and claimants' attorneys have repeatedly reported this bias to OWCP.

116. Continued use of the same physicians show financial favoritism and bias by OWCP.

117. A referee physician whose opinion goes against a claimant gets repeat appointments.

Public Interest versus Privacy

118. Under Exemption 6, the privacy exemption, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.

119. There is a public interest in identifying physicians that receive government funds to perform referee evaluations.

120. There is a public interest in identifying misuse of and failure to follow the referee selection process

121. There is a public interest in exposing financial bias and favoritism in the referee selection process.

122. Where the public interest outweighs the disclosure of agency performance of its statutory duty to randomly select referee physicians outweighs any minimal privacy interest in the name of the physician.

123. On balance the public interest in verifying that referees are selected randomly without financial favoritism outweighs any minimum privacy interest.

124. Referee physicians evaluate the entire claim file.

125. Therefore, referee evaluations take a significant amount of time and have a significant cost.

126. A referee evaluation can cost \$ 10, 000.00 or more.

127. The average cost of a referee physician examination in 2005 was approximately \$ 3,020.76.

128. 609 evaluations at \$ 3020.76 would cost OWCP \$1,839,642.84 in public funds.

129. Dr. Sabin performed 112 examinations in the past five (5) years;
and, at \$ 3020.76 an exam, this equals over \$ 338,325.00 in taxpayer money.

130. The public is entitled to know how this money is being spent.

131. The public is entitled to know whether the referee physicians are being assigned in a fair and neutral selection process.

First Cause of Action
(FOIA: Denial of Access to Records)

132. Paragraphs 1 through 131 are incorporated herein by reference.

133. Plaintiffs submitted requests to the Defendant under FOIA 5 U.S.C. § 522 *et seq.* for records stated in the Statement of Facts.

134. Defendant denied Plaintiffs' requests and refused to disclose and provide to Plaintiffs the requested information as shown in the Statement of Facts.

135. Defendant has willfully and unlawfully withheld agency information by failing to comply with the mandates of FOIA consequent to its failure and refusal to provide to Plaintiffs documents responsive to their FOIA requests and administrative appeals for purported reasons that are not within the scope of any FOIA disclosure exemptions.

136. Defendant's failure and refusal to provide to Plaintiffs documents responsive to their information requests have injured the public's interest in oversight of governmental operations.

137. Plaintiffs have a legal right under 5 U.S.C. § 552 to access and obtain the requested documents and information, and Defendant has no legal basis for denying Plaintiffs' rights of access to such information and documents.

138. Defendant's refusal to timely provide the records requested by the Plaintiff s has damaged the public's ability to verify that referees are selected randomly without financial favoritism.

139. In redacting information, the Defendant unlawfully invoked FOIA Exemptions 4 and 6. 5 U.S.C. § 522(b)(4) and (6).

140. FOIA Exemption 4 does not apply to the information being withheld by Defendant in this case and thus Exemption 4 is inapplicable to bar Plaintiffs' statutory right to the information's release. *See* 5. U.S.C. § 522(b)(4).

141. FOIA Exemption 6 does not apply to the information being withheld by Defendant in this case and thus Exemption 4 is inapplicable to bar Plaintiffs' statutory right to the information's release. *See* 5. U.S.C. § 522(b)(4).

142. Defendant's reliance on Exemptions 4 and 6 in unlawfully withholding this information represents a continuing policy that threatens to perpetuate this unlawful denial for similar FOIA requests in the future.

143. Plaintiffs exhausted all required and available administrative remedies as provided under FOIA.

144. Based on the nature of Plaintiffs' requests for information, the public will undoubtedly continue to request information from OWCP pursuant to FOIA in the foreseeable future.

145. Future claimants and the public will be adversely affected if Defendant is allowed to continue violating FOIA's disclosure provisions as it has in this case.

146. Unless enjoined and made subject to a declaration of the public's right to receive these public records by this Court, Defendant will continue violate the rights of claimants and the public to receive public OWCP records under FOIA.

147. Plaintiffs have been required to expend costs and to obtain the services of a law firm, consisting of attorneys and legal assistants, to prosecute this action.

148. Plaintiffs are entitled to costs of litigation, including reasonable attorney's fees, under the Freedom of Information Act, 5 U.S.C. § 522(a)(4)(E) and the Equal Access to Justice Act, 28 U.S.C. § 2412.

Relief Requested

WHEREFORE, Plaintiffs request that the Court award him the following relief:

(1) Declare that Defendant violated the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* as well as the regulations and policies promulgated there under by its failure to disclose the information requested by Plaintiff;

(2) Order the Defendant to immediately disclose the requested records in their entirety to Plaintiff pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 and 2201.

(3) Order Defendant enjoined from relying on an invalid regulation or practice in all future FOIA undertakings;

(4) Award Plaintiffs reasonable costs and attorney's fees; and

(5) Grant such other relief as the Court may deem just and proper.

Date July 1, 2013

Respectfully submitted,

/s/ John S. Evangelisti

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